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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 614

PANHANDLE EASTERN PIPE LINE COMPANY,
Petitioner,
vs.
FEDERAL POWER COMMISSION,
MICHIGAN CONSOLIDATED GAS COMPANY,
COUNTY OF WAYNE, MICHIGAN,
MICHIGAN PUBLIC SERVICE COMMISSION,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT, COUNTY OF WAYNE, MICHIGAN, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in the absence of a "final" judgment, and in the further absence of any showing by petitioner of any special reason or other "review-worthiness," a writ of certiorari should be granted.

STATEMENT OF THE CASE

Respondent, County of Wayne, Michigan, an intervenor in the case below and in the proceedings before the Federal Power Commission appertaining to that case, is impelled in the public interest to file this brief in opposition to the petition of Panhandle Eastern Pipe Line Company for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled cause on June 30, 1962.

In the interest of enabling this Honorable Court to decide the issue presently before it, respondent directs the Court's attention to the following pertinent matters omitted from the petition:

The proceedings culminating in the judgment, of which petitioner now seeks review by certiorari, involved not only two separate rate filings made with the Federal Power Commission in Docket Nos. G-1116 and G-2506, under which the petitioner collected charges for its own produced gas based on the so-called "field price" rather than the long-established cost rate base method, as disclosed by the petition (pp. 3, 6), but also involved revenues collected by the petitioner from its profitable hydro-carbon extraction operations at two points on its interstate transmission system.

The Commission found that these extraction operations did "improve the efficiency of the pipeline" and ordered that the revenues derived therefrom be credited to the pipeline's cost of service "thereby reducing by such amounts the cost to be recovered from ratepayers" (R. 440).

The Commission also found that the increased rates collected by petitioner under the "field price" formula were not "just and reasonable or otherwise lawful under the provisions of the Natural Gas Act" (R. 453), and, accordingly, ordered refunds for the entire period covered by the two rate filings (R. 453-455; 564-566).

The judgment below, while affirming the orders of the Commission with respect to its rejection of the "field price" formula, nevertheless remands these orders to the Commission insofar "as they relate to the allocation of the extraction plant profits at Sneed, Texas, and Liberal, Kansas, to the pipeline cost of service" (petition, pp. A7-A10). Thus, this judgment is not a "final" judgment within the meaning of the statute, and the decisions of this Court.

SUMMARY OF ARGUMENT

A. The judgment for which review by certiorari herein is sought is not a "final" judgment, inasmuch as it requires the Federal Power Commission to reach "an independent determination" on the question of whether there should be an allocation of extraction plant profits to petitioner's cost of service (petition, pp. A9, A10). In the absence of petitioner's showing of special and important reasons for the writ at this time, the petition is premature and should be denied at this juncture of the proceedings.

B. *City of Detroit v. Federal Power Commission*,[1] contrary to petitioner's assertions, is not in conflict with the decisions of this Court or other Federal courts. *Wisconsin*

[1] 230 F. 2d 810.

v. Federal Power Commission,[2] cited by the petitioner as an instance of such conflict, is readily distinguishable from the *City of Detroit* case.

C. The Circuit Court of Appeals for the District of Columbia properly held on the record before it that petitioner could not charge present customers for prospective development and exploration, and that the Federal Power Commission did not commit error in disallowing such a charge (petition, p. A6).

ARGUMENT

A. As has been stated by text writers, authorities and by this Court itself, the jurisdiction given by the statute[3] to this Court to issue writs of certiorari is one which this Court has determined should be exercised sparingly and with caution.[4]

That the granting of the writ is a matter of grace and not right is pointed up by rules of this Court which state, in part, "A review of certiorari * * * will be granted only where there are special and important reasons therefor."[5] While the original requirement of a "final" judgment for review by certiorari of cases in courts of appeal has been modified by statute,[6] nevertheless, the case must still have "review-worthiness" and involve a question of such importance that it is in the public interest to have it decided

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[2] 306 F. 2d 380.

[3] U.S.C.A. Title 28, Sec. 1254, *et seq.*

[4] *American Construction Co. v. Jacksonville, T. & K. W. Ry. Co.*, 148 U.S. 372; *In re Woods*, 143 U.S. 202.

[5] Supreme Court Rule 19.

[6] 28 U.S.C.A. 1254(1).

by this Court of last resort.' The writ will not issue "merely to accord another hearing to a party defeated in the Court of Appeals."[8]

This last statement is precisely the situation herein involved. The Court of Appeals for the District of Columbia Circuit stated in its opinion that there had been no violation of constitutional or statutory rights of the petitioner, when, on the evidence before it, the Commission repudiated petitioner's "field price" formula (A6). Thus, that court quite properly declined to substitute its judgment for that of the Commission which had acted under its statutory authority.

The Court of Appeals did, however, raise a question as to whether the Commission had properly understood its previous decision in the *City of Detroit* case, *supra*, pertaining to the allowance of extraction revenues to the cost of the pipeline service. For this reason, the court remanded the Commission's orders for further consideration of this question.

The instant proceeding is remarkably parallel to the earlier controversy involving the same parties which culminated in the *City of Detroit* case, *supra*. There, too, the same Court of Appeals had remanded an order of the Federal Power Commission, which concerned the same hydrocarbon *extraction* problem as well as petitioner's "field price" formula. The petitioner had in that case, too, sought certiorari from this Court. As the petitioner itself points out (petition, p. 5), "Certiorari was denied on October 8, 1956, 352 U.S. 829, respondent City of Detroit having argued, *inter alia*, that because the case had been remanded

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[7] *Southern Power Company v. North Carolina Public Service Company*, 263 U.S. 508.

[8] *Magnum Import Company v. Coty*, 262 U.S. 154.

to the Commission for the introduction of additional evidence, "at this juncture of the proceedings the case is not ripe for review by this Court (Brief in Opposition, pp. 8-12)."

Unfortunately for petitioner, this case is still "not ripe" for ultimate adjudication by this Court. The hydro-carbon extraction revenue problem involved herein also extant in the *Detroit* case, *supra*, has been re-submitted to the Commission for further consideration.

B. Petitioner bases one ground for the writ of certiorari in the instant case upon the fact that the decision of the Court of Appeals in the *City of Detroit* case, and in the instant proceedings are "inconsistent with the prior decisions of this Court and in conflict with the *Wisconsin v. Federal Power Commission* case (petition, p. 9).

There is no basis for this conclusion on the part of the petitioner. The Circuit Court of Appeals in the earlier *City of Detroit* case, had stated simply and succinctly, that the Commission was not bound to any particular formula, but that it should use the cost rate base "as a point of departure" when considering a different method of rate regulation. This, in effect, is what the Commission did in the *Wisconsin* case. The Commission's long-established policy of adhering to a cost rate base was again reviewed by the same Court of Appeals in the *Wisconsin* case, which held that under the peculiar circumstances of that case, the Commission could institute a new method of regulation. "The regulation of gas producers *is a new* project * * * it would be foolish for the courts to hold that the Commission is bound to apply *to these new conditions the methods and measurements designed and used for other and different regulatory purposes.*"* (Emphasis supplied.)

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* *Wisconsin v. Federal Power Commission, supra*, p. 387.

Nor can any "conflict" between the *Detroit* and the *Wisconsin* cases be inferred from the following excerpt.

> "The difference between a public utility, *such as a pipeline* rendering a service by means of a fixed plant and operation, and a producer, who discovers or buys a product where, when and under such terms as he may, and sells that product under contracts negotiated on the open market, are too evident to justify elaboration. * * *" (Emphasis supplied.)[10]

The Court itself noted that there was a material distinction between the "field price" formula in the *Detroit* case and the problem facing the Commission in the *Wisconsin* proceeding, as is evident by the following:

> "The Commission is not here proposing to accept a field price, or any other price as is. It has announced guideline rates which it deems to be, on the basis of the internal data in its files on all the operators in the several areas, fair rates for the product in those areas. Such rates, thus determined, would seem to be just and reasonable rates for the consumers of the product."[11]

C. The Circuit Court of Appeals found that the Federal Power Commission, in reviewing the "field price" formula had exercised its judgment on the evidence before it at the time. In this connection, we can do no better than quote from the Opinion of the Court itself (petition, p. A6):

> "We think that the Commission was not obliged on the record made to grant a larger allowance than it did, and that it left the door open for a more liberal treatment in future years on a more persuasive record. *Certainly it was entitled to reject the claim*

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[10] *Wisconsin v. Federal Power Commission*, p. 388.

[11] *Op. cit.*, p. 389.

based on hypothetical development costs not actually incurred. Especially is this so in light of Panhandle's failure in fact to carry out a full exploration program, the availability of other methods of financing development, and the difficulty of insuring that the funds from a rate increase attributable to granting the requested development allowance would actually go into exploration and development.

"The issues raised here involve a delicate balancing by the Commission of the interests of the company, its shareholders, the consumer, and the public. After careful consideration, we are unable to say that the method of computation selected by the Commission was unjust, unreasonable, or not conductive to proper exploration and development. Cf. *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944)." (Emphasis supplied.)

In the light of the foregoing, how can Panhandle or any other party to this proceeding hold that the Federal Power Commission had abused its discretion or that it did not exercise its best judgment on the record before it?

The Court of Appeals here clearly refused to substitute its judgment for that of the Commission in the absence of a showing of an abuse of discretion.

The instant proceeding involves upwards of 40 million dollars in increased rates collected by petitioner that have been found to be unlawful. None of the principles involved in either the determination of such rates or the repudiation thereof is new, novel or judicially earth-shaking. As was said by this Court in a recent case:[12]

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[12] *Deputy v. DuPont*, 308 U.S. 488.

> "The function of this court is to resolve conflicts of jurisdiction and to settle important principles of law. The discretionary power of this court to review judgments of lower federal courts was not intended to be exercised in every case where those courts have adjudicated the conflicting claims of the parties, which involves no important principles of law and no conflict of decisions among the federal courts. Our rules adopted to carry out the policy of the statutes granting the power to bring cases here by certiorari have apprised the Bar and the public that we will not take cases fully heard and adjudicated below for the mere purpose of re-examining the correctness of the result."

In essence, all that petitioner seeks is a second review of the matter, not because the judgment fails to resolve conflicting claims or because an important legal principle is involved, but purely and simply because petitioner is unhappy over the decision of the Court of Appeals.

CONCLUSION

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in this Court and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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